BANK OF COMMERCE (M) BHD

v.

HJ MAZLAN HJ KHAMIS & ORS

HIGH COURT MALAYA, KUALA LUMPUR
T SELVENTHIRANATHAN J
[SUIT D1-22-590-1997]
13 AUGUST 1998

CIVIL PROCEDURE: *Amendment - Defence and counterclaim - Amendment not merely to plead in the alternative but to include new grounds or claim inconsistent with previous pleadings - Amendment sought after plaintiff's applications for summary judgment and to strike off original counterclaim - No affidavit explaining why amendments not incorporated in original defence and counterclaim - Whether permissible - Whether affidavit evidence necessary - Whether application to amend should have been made earlier - Rules of the High Court 1980, O. 18 r. 10(1) & (2)*

CIVIL PROCEDURE: *Amendment - Defence and counterclaim - Inclusion of new grounds or claim - New allegation of fraud – Whether police report ought to have been made - No affidavit explaining why amendments not incorporated in original pleadings - Whether defendant deemed to be aware of such facts when original pleadings filed - Whether amounts to tactical manoeuvre*

The first defendant applied to amend his defence and counterclaim. The application was heard before the senior assistant registrar who allowed the same. The plaintiff appealed to the judge-in-chambers against this decision under O. 56 r. 1 of the Rules of the High Court 1980 ('RHC') on the grounds that the proposed amendments to the defence and counterclaim were contrary to the original defence and counterclaim filed. This, it was contended, amounted to a tactical manoeuvre to delay the plaintiff's application for summary judgment against all three defendants and its further application to strike out their counterclaim. The plaintiff further contended that this tactical manoeuvre had resulted in the first defendant seeking to implicate third parties, admit an oral agreement and raise issues of fraud and estoppel in his pleading as an afterthought since none of these issues were referred to in the original defence and counterclaim. The first defendant on the other hand, contended that he had a right to amend his pleadings at any stage of the proceedings and that there was no necessity to file an affidavit in support of such an application under O. 20 rr. 5 and 8 of the RHC.

Held:

[1] A court has to look at the substance of the amendments sought and not the label that the party applying to amend attaches to the amendments even if the amendments are contended to raise claims or defences in the alternative.

[2] Looking at the amendments sought here, it was clear that the first defendant was pleading disputed facts. The first defendant sought to take a stance not only inconsistent with but also contrary to what was pleaded in the original defence and counterclaim.

[3] The first defendant was not applying for leave to amend his previous pleading so as to plead in the alternative the allegations now sought to be raised, as he would be allowed to do pursuant to O. 18 r. 10(2) of the RHC, but instead was seeking to raise altogether new grounds of defence and counterclaim which were inconsistent with his previous pleading as contained in the original defence and counterclaim, which he would be clearly prohibited from doing under O. 18 r. 10(1) of the RHC.

[4] Although fraud and misfeasance by a third party and the other unnamed persons were alleged, which in normal circumstances should have actuated the aggrieved party to lodge a police report, no evidence of such police report having been lodged was available.

[5] In the absence of any affidavit stating otherwise, it could be deemed that the first defendant was in possession of the facts sought to be introduced now by amendment when the original defence and counterclaim were filed.

[6] In the absence of any affidavit evidence explaining why the amendments now sought were not incorporated in the defendants' original defence and counterclaim, the inescapable conclusion was that the amendments sought clearly amounted to overreaching.

[7] The first defendant's application to amend his pleading was made at the time when the plaintiff had already tendered nearly all its evidence. The defendants should have asked for the amendment at a much earlier stage. Therefore, if the first defendant did not intend to support his application by affidavit evidence, he should have so applied before the filing of the plaintiff's applications for summary judgment and to strike out the original counterclaim which would entitle the plaintiff to have the matter disposed of with finality in a summary manner.

[8] The proceedings having reached this stage, it was incumbent upon the first defendant to produce some credible evidence upon affidavit to support his application to amend his pleadings. As he has consciously elected not to do so, this led the court to believe that his application to amend his pleading was a mere tactical manoeuvre solely intended to overreach.

[Appeal allowed with costs.]

Cases referred to:

Atkinson v. Fitzwalter & Ors [1987] 1 WLR 201 ***(refd)***

Bacom Enterprises Sdn Bhd v. Jong Chuk & Ors [1998] 2 CLJ 11 ***(cit)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 ***(cit)***

Dato' Wong Gek Meng v. Pathmanathan Mylvaganam & Ors [1998] 1 CLJ 625 ***(cit)***

David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 ***(foll)***

Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port & Ors [1989] 1 CLJ 919 ***(cit)***

Gan Boon Kyee v. Yap Hong Sin & Anor [1997] 3 CLJ 822 ***(cit)***

Hock Hua Bank Bhd v. Leong Yew Chin [1987] 1 CLJ 126 ***(cit)***

Hollis v. Burton [1892] 3 Ch 226 ***(cit)***

Ismail Ibrahim & Ors v. Sum Poh Development Sdn Bhd & Anor [1988] 1 CLJ 632 ***(foll)***

Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 ***(cit)***

Lawrance v. Lord Norreys [1888] 39 Ch 213 ***(cit)***

Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd [1995] 4 MLJ 616 ***(cit)***

Ng Hee Thong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 ***(cit)***

Pemunya Kapal MV Brihope & Ors v. Emmanuel E Okwuosa & Ors [1996] 4 CLJ 461 ***(cit)***

Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 ***(cit)***

Seng Choon Hardware (M) Sdn Bhd v. The Director-General of Customs & Anor [1993] 2 CLJ 114 ***(refd)***

Sykt Telekom Malaysia v. Business Chinese Directory Sdn Bhd [1997] 1 CLJ 596 ***(cit)***

The Chairman, Board of Directors Assunta Hospital v. SS Gill dan Satu Lagi Dan Satu Lagi Kes [1995] 2 CLJ 713 ***(cit)***

United Overseas Bank Ltd v. Heap Huat Rubber Co Sdn Bhd [1993] 4 CLJ 191 ***(cit)***

Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor [1996] 2 CLJ 628 ***(cit)***

Yong Seng Construction v. Celaju Sdn Bhd [1994] 2 CLJ 690 ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 14, O. 18 rr. 10(1), (2), 19(1)(b), (d), O. 20 rr. 5, 8, O. 56 r. 1

Other source referred to:
Bullen, Leake & Jacob's Precedents of Pleadings, IH Jacob, 1975, 12th edn,
Mallal's Digest, 1996, Malayan Law Journal
Pleadings: Principles and Practice, Sir Jack Jacob & S Goldrein
The Supreme Court Practice 1997

For the plaintiff - Benjamin John Dawson; M/s Nik Hussain & Partners
For the 1st defendant - Lawrence Tan Wah Siong; M/s WS Tan & Co

Reported by Cindy Chan

JUDGMENT

T Selventhiranathan J:

The first defendant applied *vide* encl. (11) to amend the defence and counterclaim which had been filed in this action. The application was heard by the senior assistant registrar who allowed the same after hearing arguments. Against that decision the plaintiff has appealed to the judge in chambers *vide* encl. (21) under O. 56 r. 1 of the Rules of the High Court 1980.

Any reference hereinafter in this judgment to a specific Order and rule shall mean that Order and rule in the Rules of the High Court 1980.

The main ground upon which the plaintiff raised its objection to the first defendant's application is that the proposed amendments to the defence and counterclaim are contrary to the original defence and counterclaim filed in this action. Furthermore, the plaintiff contends that the reason for the amendments being sought is to delay its application for summary judgment against all three defendants and its further application to strike out their counterclaim.

In support of this contention, the plaintiff has raised as a further ground of objection the timing of the first defendant's application to amend which has come hard on the heels of the plaintiff's said two applications for summary judgment and to strike out the counterclaim. The plaintiff also contends that the application to amend the defence and counterclaim is an afterthought made to delay the proceedings herein because the borrower itself, a company to which the plaintiff had granted loan facilities, had asked the plaintiff to exercise its rights under the debenture pertaining to the loan facilities, and the facts raised in the proposed amendments to the defence and counterclaim are contrary to what was originally pleaded and is a tactical manoeuvre adopted by the first defendant. The plaintiff further contends that this tactical manoeuvre has resulted in the first defendant seeking to raise issues of fraud and estoppel in his pleading as an afterthought.

The first defendant, on the other hand, contends that he has a right to amend his pleading at any stage of the proceedings and there is no need to file an affidavit in support of such an application under O. 20 rr. 5 and 8, and that the plaintiff could not raise any objection in these circumstances.

In the course of arguments, neither party adverted to a specific provision in O. 18 r. 10 which, to my mind, is material to the first defendants application although Encik Dawson for the plaintiff in his submission did make general reference to authorities on amendments. That rule provides as follows:

> 10 (1) A party shall not in any pleading make an allegation of fact, or raise any new ground or claim, inconsistent with a previous pleading of his.
>
> (2) Paragraph (1) shall not be taken as prejudicing the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.

Let me at the outset say that the court has to look at the substance of the amendments sought to be made and not the label that the party applying to amend attaches to the amendments even if the amendments are contended to raise claims or defences in the alternative. Having said that, and looking at the amendments sought to be made, it is clear that the first defendant is pleading disputed facts in the amendments sought. It cannot be gainsaid that the first defendant was in possession of these facts when the original defence and counterclaim were filed. Yet, in the proposed amendments, the first defendant seeks to bring into existence a third party, one Chian Ngook For, and the other unnamed persons, and to admit a so-called oral agreement reached between the plaintiff and the first defendant which, if true, would have serious consequences on the original agreement entered into between the plaintiff and the other parties thereto as it would have the effect of substantially varying the original agreement. No evidentiary facts relating to the purported oral agreement are set out in an affidavit which would give the plaintiff an opportunity to reply thereto.

Therefore the first defendant cannot by merely seeking to raise the purported oral agreement in the defence and counterclaim contend that he should be allowed to do so without any supporting evidence for the court to consider the basis for the amendments sought. The facts show that this is a situation where the first defendant seeks to take a stance not only inconsistent with but also contrary to what was pleaded in the original defence and counterclaim. As Encik Dawson for the plaintiff has pointed out, the first defendant initially admitted the existence of the original agreement upon which the plaintiff's claim is based but has denied it in the proposed defence and counterclaim. The first defendant at first instance admitted the contractual terms of the original agreement but is now seeking to deny the same.

I reproduce below the inconsistencies that have been tabulated by Encik Dawson between the original and proposed defence and counterclaim as follows which bring home the thrust of his arguments:

Original Defence/Counterclaim	Proposed Defence/Counterclaim
(a) **Admits** the existence of the letter of offer, loan agreement and debenture between the plaintiff and the borrower	(a) **Denies** the existence of the said documents
(b) **Admits** the contractual terms of the documents stated above	(b) **Denies** the contractual terms of the said documents
(c) **Admits** the primary obligations that arise from the guarantee and that he is the real party to the contract Claims that the plaintiff owes a duty towards him as the guarantor	(c) Now claims that he merely executed the guarantee as the agent and trustee of one Chian Ngok For, a third party, and that he is not the real party to the guarantee
(d) **Admits** that he is a shareholder in the borrower	(d) Claims that he is merely a trustee
(e) **Admits** receipt of the letter of demand	(e) **Denies** receipt of the letter of demand
(f) Claims that the plaintiff **wrong fully** recalled the banking facilities and appointed a receiver and manager and as a result the borrower suffered very heavy losses	(f) (i) Claims that the loss suffered by the borrower was caused by the fraud and misappropriation of the said Chian Ngook For (ii) Claims that there was an oral agreement between the plaintiff and all the defendants whereby the plaintiff would, with the defendants' consent, appoint a receiver and manager to take action against the said Chian Ngook For and the debtors of the borrower and would withhold action against the guarantor. Arguments on estoppel were raised

In the main, I agree with what Encik Dawson has submitted above.

However, I would also like to refer to the commentary in *The Supreme Court Practice 1997* in relation to O. 18 r. 10(1) and (2), which counsel for the parties appear to have missed in their submissions, and reproduce the same below in amplification of applicable principles (paras 18/10/1 and 18/10/2):

> **Effect of rule** – This rule means that a party's second pleading must not contradict his first; and the effect of the rule is to prevent a plaintiff from setting up in his reply a new claim which is inconsistent with the cause of action alleged in the statement of claim. See *Earp v. Henderson* [1876] 3 Ch D 254; *Williamson v. L & NW Ry Co* [1879] 12 Ch D 787.
>
> **Examples** – If a plaintiff claims rent on his writ, he cannot claim the same sum in his reply as damages for unlawfully 'holding over' (*Duckworth v. McClelland* 2 LR Ir 527). So, if the claim is for rent and dilapidations under a lease, and the defendant pleads that the lease was assigned and became vested in another person, the reply cannot plead that the defendant became a yearly tenant by occupation and payment (per Vaughan Williams LJ in *Pash v. Keays* [1898] unreported). So, if the statement of claim alleges merely a negligent breach of trust, the reply must not assert that such breach of trust was fraudulent (*Kingston v. Corker* [1892] 29 LR Ir 364]. Such inconsistent claims should be pleaded, if at all, alternatively in the statement of claim; and the plaintiff may amend or apply for leave to amend the statement so as to plead such allegations or claims in the alternative.
>
> An allegation made in the reply which is inconsistent with that made in the statement of claim, eg that undue influence originally alleged against the defendant was in the alternative exercised by the deceased's husband, will be struck out (*Herbert v. Vaughan* [1972] 1 WLR 1128; [1972] 3 All ER 122).

It is patently obvious here that the first defendant is not applying for leave to amend his previous pleading so as to plead in the alternative the allegations now sought to be raised, as he is allowed to do pursuant to O. 18 r. 10(2), but instead of that he is now seeking to raise altogether new grounds of defence and counterclaim which are inconsistent with his previous pleading as contained in the original defence and counterclaim, which he is clearly prohibited from doing under O. 18 r. 10(1).

To put matters in perspective, the first defendant now seeks to implicate the said third party and other unnamed persons in this action by diverting any liability away from him to them, and absolving himself from direct involvement in the loan facilities that were granted to the borrower company. Although fraud and misfeasance by the third party and the other unnamed persons are alleged, which in normal circumstances should have actuated the aggrieved party to have lodged a police report, no evidence of such police

report having been lodged that monies were siphoned off fraudulently by the third party and the other unnamed persons has been forthcoming. On the necessity to make a contemporaneous police report in circumstances where a demand for a bribe was alleged, the Court of Appeal, speaking through Gopal Sri Ram JCA, had this to say in *David Wong Hon Leong v. Noorazman bin Adnan* [1995] 3 MLJ 283 at pp. 291-292:

> We now turn to the charge of bribery. This is a most serious allegation in which is housed the implication that the appellant was a person who was prepared to indulge in the bribery of public officials in order to achieve his purpose. Now let us say at once that there is not an iota of independent evidence to support this charge. It does not find mention in the appellant's first affidavit delivered in opposition to the respondent's summons for judgment.
>
> The appellant did not lodge a contemporaneous police report complaining about the demand for a bribe. Indeed, he only lodged a police report during an adjournment in the proceedings and annexed it to an affidavit of his, delivered well after the hearing of the respondent's summons had commenced. This act of the appellant was prompted, no doubt, by the observation by the learned judge during the hearing that no report had been lodged at the material time. The failure of the appellant to lodge a contemporaneous police report led the learned judge to make the following remark which appears in the note of the proceedings recorded by him:
>
> > The fact that you are prepared to lodge a report only after I have pointed it out to you that it should have been done immediately, will go to show that the tale that your client has told is far-fetched. If it is true, he would have reported it to the police at once without paying the bribe. If he has paid the bribe, he has committed an offence. If that is so, it is my duty to send the papers to the Public Prosecutor. If you raise this defence, then you must have admitted to corruption.
> >
> > Later, after the court resumed the hearing, counsel informed the learned judge that a report had been lodged during the adjournment. This led to the following exchange between the judge and counsel:
> >
> > Mr Mahalingam : My client has lodged a report just now.
> >
> > Chan J : You have missed the point. What I have told you before the lunch break is that your client has admitted to me just now through you that he has committed a criminal offence in that he had paid over a sum of money for the purpose of bribery. I then adjourned the matter for you to think it over and to be careful of what you say. So by what you have just told us, you are still insisting that the defence is that your client was a party to a crime.

This leaves me with no choice but to adjourn the matter so that I can take the necessary steps to inform the police.

Adjourned to Monday (4 October 1993).

The affidavit exhibiting the police report came on file on 6 October 1993.

We entirely agree with the approach of the learned judge to the weight to be given to the failure of the appellant to timeously lodge a report with the police. Further, an examination of the conduct of the appellant after the commencement of the litigation, his failure to raise this matter at the earliest opportunity in his first affidavit, and producing it, as a conjurer does, like a rabbit out of a hat, leaves us in no doubt, as it did the learned judge, that the tale was an afterthought, the machinations of a desperate litigant trying every trick in the book to escape judgment being entered against him.

We would add that the charge of bribery, even when made in civil proceedings, is a serious charge. It is akin to a charge of fraud, or a plea of justification in a libel action. It should not be lightly taken in the absence of convincing evidence in the hands of the advocate having conduct of the cause. A solicitor who makes such a charge without foundation faces the risk of being disciplined for misconduct. And one must not overlook the fact that the charge in this case has been levelled against an elected official, the chief executive of a state government. (Emphasis added)

The allegation of fraud resulting in the defalcation of funds belonging to the borrower company by the third party and the other unnamed persons, if made *bona fide*, should similarly have been supported by a contemporaneous police report as in this case a charge of fraud, if seriously made and proved, will bring penal consequences to the perpetrator, and such charge will not be lightly made by a would-be complainant to set the investigative machinery of the police in motion as the making of a false police report will bring in its wake equally dire consequences for the complainant.

In these circumstances, what the first defendant now seeks by the proposed amendments is to introduce into his pleading facts diametrically opposed to those pleaded originally, which diametrically-opposed facts were available even then. However, his pleading at that stage did not in any way give any hint of the involvement of the third party and the other unnamed persons in any fraud. Therefore, it is incumbent on the first defendant to adduce supporting affidavit evidence now evincing facts thereof so that the plaintiff would be in a position to admit or deny the same, particularly so when the first defendant seeks to raise the spectre of a purported oral agreement which would have far-reaching consequences on the earlier admitted written agreement and other related documents (please see tabulation earlier in this judgment).

In *Ismail bin Ibrahim and Others v. Sum Poh Development Sdn Bhd and Another* [1988] 1 CLJ 632; [1988] 3 MLJ 348, Mohamed Dzaiddin J (now FCJ) had occasion to discuss various authorities pertaining to the amendment of pleadings, including the English Court of Appeal decision in *Atkinson v. Fitzwalter and Others* [1987] 1 WLR 201 upon which he commented as follows at p. 351 of the report of *Sum Poh Development Sdn Bhd and Another*:

> Stocker LJ, in his judgment at page 219, identified two circumstances in which an amendment to add an allegation of fraud would not be permitted: 'where the facts giving rise to the plea of fraud were all known at the time of the original pleading and certainly where the failure to plead such facts could amount to 'overreaching' or where the delay in pleading fraud was in connection with some tactical manoeuvre'

His Lordship then went on to find on the facts obtaining in the case before him that the application for amendment "was made to avoid the original writ and the statement of claim from being struck out" and that it was "this situation that Stocker LJ called a 'tactical manoeuvre' ". He concluded his judgment saying:

> ... I cannot accept Mr Lim's submission that the facts were not known to the plaintiffs or that they had inadvertently omitted to plead in the original claim. Even the supporting affidavit of the plaintiffs did not depose anything to this effect.
>
> Finally, it is as clear as day to me that both *Yamaha* (ie, *Yamaha Motor Co Ltd v. Yamaha Malaysia Sdn Bhd and Others* [1983] 1 MLJ 213) and *Atkinson* have crystallized the principle governing amendments of pleadings which was first enunciated in 1883 in *Clarapede* (ie, *Clarapede & Co v. Commercial Union Association)* [1883] 32 WR 262). They are, however, not without exceptions. In the case of adding fraud, according to Stocker LJ in *Atkinson*, they cannot be allowed if the facts giving rise to the plea of fraud were all known earlier or where the delay was in connection with some tactical manoeuvre. In the present case, Mr Chan has succeeded in persuading me to accept the exceptions identified by Stocker LJ as being relevant.
>
> Therefore, for the above reasons, I must disallow the plaintiffs' application for leave to amend their pleading with costs. In addition, I give costs to the first defendant.

In the present case, all the three defendants filed a joint defence and counterclaim on 7 February 1998 when the facts relating to the amendments now sought of the purported oral agreement and further alleging fraud and defalcation of the borrower company's monies by the third party and the other unnamed persons can be deemed to have been in the knowledge of the first defendant in the absence of any affidavit stating otherwise.

The plaintiff filed its reply to the original defence and counterclaim on 5 March 1998 and, on 13 March 1998, proceeded to file two applications – one for summary judgment under O. 14 in encl. (8), and the other to strike out the counterclaim of the defendants under O. 18 r. 19(1)(b) and (d) in encl. (10). Both these applications were set down for hearing on 14 April 1998.

However, on 8 April 1998, the first defendant filed its application in encl. (11) to amend the defence and counterclaim (and subsequently, at the hearing of the appeal before me, obtained without objection an order to confine the amendments to his position only). This application in encl. (11) was fixed for hearing on 5 May 1998 before the senior assistant registrar but it resulted in the plaintiff's said two applications fixed for hearing on 14 April 1998 being adjourned when they came up before her.

Against the factual background narrated and for the reasons elaborated in the course of this judgment, I have no hesitation in holding that the amendments sought by the first defendant are indeed, in the words of Stocker LJ, a "tactical manoeuvre" intended to delay the hearing of the plaintiff's said two applications and, in the light of the glaring absence of any affidavit evidence explaining why the amendments now sought were not incorporated in the defendants' joint original defence and counterclaim, I can only come to the inescapable conclusion that the failure to plead therein the alleged facts now incorporated in the amendments sought clearly amounts to overreaching, resulting in the first defendant being hoisted with his own petard. In this context, reference may also be made to my judgment in *Yong Seng Construction (suing as a firm) v. Celaju Sdn Bhd* [1994] 2 CLJ 690 where similar issues were canvassed and decided upon.

Encik Dawson also submitted that the first defendant's application to amend his pleading after the filing of the plaintiff's said two applications for summary judgment and to strike out the counterclaim was akin to the first defendant applying to amend his pleading after the plaintiff had adduced evidence and closed its case at a trial proper because, if the plaintiff were successful in its said two applications, the whole action would be disposed of with finality.

I am of the view that this point is well taken and it therefore further behoved the first defendant to support his application to amend his pleading with credible affidavit evidence if he wished the action to proceed to trial. Otherwise it will be making a mockery of one of the cardinal purposes of pleadings, ie to identify and narrow down the issues and prevent surprises at trial so that the court will be called upon to adjudicate upon real triable issues and not allow evidentially unsubstantiated pleadings to become an engine of delay to deny the plaintiff its just rights.

In the present case, the first defendant's application to amend its pleading, unsupported as it were by an iota of evidence on affidavit, was made, in the words of Wan Adnan bin Ismail J (now Chief Judge Malaya) in *Seng Choon Hardware (M) Sdn Bhd v. The Director-General of Customs and Another* [1993] 1 AMR 10: 394 at p. 397, "... at the time when the plaintiffs had already tendered nearly all their evidence" and "the defendants should have asked for the amendment at a much earlier stage" which, in the context of the present case would mean, that if the first defendant did not intend to support his application by affidavit evidence, then he should have so applied before the filing of the plaintiff's said two applications which are supported by substantial affidavit evidence revealing, in the plaintiff's view, the strength of its claim and the weakness of the defence and counterclaim entitling the plaintiff to have the matter disposed of with finality in a summary manner.

The proceedings having reached this stage, it was incumbent upon the first defendant to produce some credible evidence upon affidavit to support his application to amend his pleading. As he consciously elected not to do so, he was taking a risk which of course he was entitled to take. But the consequence of adopting such a course of action led the court to believe that his application to amend his pleading was a mere tactical manoeuvre solely intended to overreach.

The case of *Yamaha*, on which counsel for the first defendant placed great reliance in arguing the application before the senior assistant registrar to amend the defence and counterclaim and in further arguing the appeal before me, does not help the first defendant at all. The reasons are two-fold. Firstly, there was affidavit evidence in that case supporting and opposing the application to amend the pleading which enabled the court to evaluate the evidence before deciding whether to allow the application.

Secondly, and more importantly, in the words of Mohamed Azmi FJ (as he then was) at p. 216 of the report of that case, "Nor have the respondents been able to show that by such amendment, the original suit would be turned into a suit of a different and inconsistent character".

However, in the present case, the plaintiff has succeeded in showing that the original defence and counterclaim of the first and the other two defendants was based on a premature wrongful recall of the loan facilities, allegedly resulting in damages being suffered by them. However, if the first defendant's application to amend his pleading were now allowed, it would turn the defence and counterclaim into one of a different and inconsistent character from the original one in that the plaintiff's claim would have to be directed against the third party and the other unnamed persons arising from the plaintiff's purported failure to take action against the third party and debtors of the

borrower company, while leaving the first defendant absolved of all liability, ie to emerge unscathed.

The parties also relied upon the following additional authorities in argument:

1. *Dato Wong Gek Meng v. Pathmanathan Mylvaganam & Others* [1998] 1 CLJ 625
2. *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399.
3. *Pemunya Kapal MV Brihope and Others v. Emmanuel E Okwuosa & Others* [1996] 4 CLJ 461; [1997] 1 MLJ 453
4. *Sykt Telekom Malaysia v. Business Chinese Directory Sdn Bhd* [1997] 1 CLJ 596; [1996] 3 MLJ 692
5. *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Another* [1996] 2 CLJ 628; [1996] 2 MLJ 54
6. *Gan Boon Kyee v. Yap Hong Sin & Another* [1997] 3 CLJ 822
7. *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396; [1996] 1 AMR 846
8. *Bacom Enterprises Sdn Bhd v. Jong Chuk & Others* [1998] 2 CLJ 11; [1998] 2 MLJ 301
9. Bullen and Leake and Jacob's *Precedents of Pleadings* Twelfth Edition, 1975, by IH Jacob
10. *Pleadings: Principles and Practice* by Sir Jack Jacob and S Goldrein
11. *United Overseas Bank Ltd v. Heap Huat Rubber Co. Sdn Bhd* [1993] 4 CLJ 191
12. *The Chairman, Board of Directors Assunta Hospital v. SS Gill & Satu Lagi & Satu Lagi Kes* [1995] 2 CLJ 713
13. *Hollis v. Burton* [1892] 3 Ch 226
14. *Lawrance v. Lord Norreys* [1888] 39 Ch 213
15. *Lim Nyang Tak Michael v. ACE Technologies Sdn Bhd* [1995] 4 MLJ 616
16. Mallal's Digest 1996 Malayan Law Journal
17. *Fabrique Ebel Societe Anonyme v. Syarikat Perniagaan Tukang Jam City Port and Others* [1989] 1 CLJ 919; [1988] 1 MLJ 188

18. *Hock Hua Bank Bhd v. Leong Yew Chin* [1987] 1 CLJ 126; [1987] 1 MLJ 230

19. *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331

20. *Ng Hee Thong and Another v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281

Having taken into consideration all the cited authorities, and for the reasons stated earlier, I allow the appeal of the plaintiff in encl. (21) with costs.